Supreme Court

(1)

95-70 JUL 11 1995

No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1995

Columbia Steel Fabricators, Inc., and
Stevens Equipment Company, *Petitioners,*

v.

U.S. Court of Appeals for the Ninth Circuit,
and the U.S. District Court for the
Northern District of California, *Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel
Aldo Branch
2105 S. Bascom, Suite 248
Campbell, CA 95008
(408) 377-8787

Richard M. Peekema
4817 Wellington Park Dr.
San Jose, CA 95136
(408) 224-8948
Counsel of Record

QUESTIONS PRESENTED

1. Whether a district court has the authority to enter arbitrary summary judgment *sua sponte* against a party without notice or opportunity to respond.

2. Whether a district court has the authority to enter arbitrary summary judgment *sua sponte* for a non-appearing party.

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IN THE SUPREME COURT OF THE UNITED STATES

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Columbia Steel Fabricators, Inc., and
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U.S. Court of Appeals for the Ninth Circuit,
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Northern District of California, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Columbia Steel Fabricators, Inc. and Stevens Equipment Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 44 F.3d 800 (9th Cir. 1995). The opinion of the district court (App., *infra*, 10a-18a) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 9, 1995 (App., *infra*, 1a-8a). Petitioners' motion for rehearing was denied by the court of appeals on April 12, 1995. (App., *infra*, 9a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE INVOLVED

Rule 56 of the Federal Rules of Civil Procedure is the primary focus of this petition.[1]

STATEMENT OF THE CASE

In February 1989, Stevens Equipment Company ("Stevens"), entered into a contract with Ahlstrom Recovery, Inc. ("Ahlstrom") to fabricate the structural and miscellaneous steel for the building to house a recovery boiler for the Louisiana Pacific Co. in Samoa (Humboldt County), California. Ahlstrom, whose parent corporation is based in Finland, was the general contractor on the job. Ahlstrom had contracted with Aaro Kohonen Oy ("AKO"),

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[1] Rule 56 of the Federal Rules of Civil Procedure provides, in relevant part:

" SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

a Finnish corporation, to provide the engineering on the job. Stevens sub-contracted with Columbia Steel Fabricators, Inc. ("Columbia") to assist with the steel fabrication, and specifically to fabricate the very large plate girders required to support the recovery boiler, since they required crane lifting capacity beyond that in Stevens' shop.

The job did not go smoothly. Delays by AKO and Ahlstrom in providing the engineering drawings, and changes to the details of the drawings resulted in significantly greater costs in the fabrication of the steel. After the job was completed, Stevens tried to persuade Ahlstrom to adjust the contract price for the extra costs attributed to the delays and the changes. Attempts to resolve the differences by negotiation failed.

A. The Prior Proceedings. In 1990, Stevens filed suit in California Superior Court in Humboldt County against Ahlstrom alleging breach of contract, and related causes of action arising out of the contract. Pursuant to the contract between Stevens and Ahlstrom, this issue was submitted to binding arbitration under the auspices of the American Arbitration Association. The arbitration hearing was held in January 1991. Neither Columbia nor AKO were parties to the state action brought in Humboldt County, or to the arbitration proceedings arising thereunder.

Although the Superior Court complaint alleged negligent misrepresentation against Ahlstrom, Stevens had no evidence to support that allegation when the matter was submitted to arbitration, and only the breach of contract allegations were placed before the arbitration panel.

During the limited discovery permitted before arbitration, Stevens uncovered evidence of what it believed to be intentional misrepresentation by Ahlstrom and by AKO. The arbitration panel refused to admit any evidence relating to the alleged fraud of Ahlstrom. That evidence had been acquired by Stevens less than six weeks before the arbitration hearing, and Ahlstrom vigorously objected to its presentation at the hearing. The arbitration panel

sustained those objections and refused to consider any evidence related to misrepresentation.

Stevens was the prevailing party in the arbitration, although the panel disallowed some of Stevens' claims and allowed some of the offsets asserted by Ahlstrom. The decision of the arbitration panel eliminated any award to Stevens on behalf of Columbia on the grounds that Columbia was not a party to that action.

In motions to the arbitration panel for rehearing, and in motions to the Superior Court to vacate the award, Columbia and Stevens argued that they had been denied a fair hearing because no evidence had been admitted regarding the misrepresentations made by Ahlstrom, and that the claims of misrepresentation were not being considered. All these motions were denied, and Stevens was never permitted to offer its evidence of misdeeds. Thus, the arbitration proceeding and arbitration award associated therewith considered only the contract related causes of action, and heard nothing about the intentional misrepresentations Stevens believed were made by Ahlstrom.

B. The District Court Proceedings. Subsequent to the arbitration proceeding, in September 1992 Columbia and Stevens filed a complaint in the Northern District of California based upon diversity jurisdiction. (28 U.S.C. § 1332). The complaint alleged fraud causes of action against Defendants Ahlstrom and AKO. The lack of a contract between Columbia and Ahlstrom, or between either Plaintiff and AKO was no longer a bar to including all these causes of action in a single complaint for the sake of judicial economy. Defendant Ahlstrom was served in the U.S., and AKO was served in Finland. Ahlstrom answered the complaint, and AKO did not.

In January 1993, Ahlstrom filed a motion for summary judgment based upon *res judicata* and the statute of limitations on fraud causes of action. Ahlstrom's *res judicata* argument was based on a decision reached in binding arbitration on a breach of contract action by

Stevens against Ahlstrom. Ahlstrom's statute of limitations argument was based on implied constructive notice rather than actual discovery of the fraud alleged in this case.

On Friday, February 26, 1993, a hearing on Ahlstrom's motion was held, and the District Court granted summary judgment for Ahlstrom against Columbia and Stevens, and imposed sanctions, including Ahlstrom's attorneys fees, against Columbia, Stevens, and their attorneys. At the close of the hearing, after the Court had read its opinion into the record, counsel for Columbia and Stevens sought the attention of the Court, and asked about AKO, intending to notify the Court that process had been served on that defendant. Before counsel could continue, the Court announced, as an afterthought, and to the complete surprise and shock of Columbia, Stevens, and their counsel, that the summary judgment would also apply in favor of AKO. That terminated the hearing. (App., *infra*, 20a). On Tuesday, March 2, 1993, the district court filed its order, and on Wednesday, March 3, 1993, the district court entered its judgment based on that order. (App., *infra*, 10a). Over a month later, on April 8, 1993, the district court filed its order granting sanctions.

C. The Proceedings on Appeal. On April 1, 1993, Plaintiffs Columbia and Stevens, filed a Notice of Appeal to the Ninth Circuit of the United States Court of Appeals, from the District Court judgment entered March 3, 1993. (Docket No. 93-15659). On September 13, 1993, Columbia, Stevens, and their attorneys, Aldo Branch, and Richard M. Peekema, filed a timely Notice of Appeal to the Ninth circuit from the district court order filed April 8, 1993. (Docket No. 93-16704).

The first appeal was fully briefed, and the second appeal was partially briefed when Columbia and Stevens reached a settlement in February 1994 with Ahlstrom on these appeals. Thereafter, and on or about February 22, 1994, the second appeal, Docket No. 93-16704 was dismissed on stipulation by Columbia, Stevens, and Ahlstrom, and the first appeal, Docket No. 93-15659, was

dismissed in part to the extent that it concerned Ahlstrom, but was not modified with regard to AKO. Also, pursuant to stipulation by the parties, on or about March 14, 1994, the District Court filed an order vacating the previous order and judgment granting sanctions against Columbia, Stevens, and its attorneys. (App.,*infra*, 19a)

Columbia and Stevens' motion for summary reversal on the remaining issue on the appeal was denied. The appeal was considered by the Court of Appeals in December 1994 without oral argument. At no time were Columbia and Stevens given notice that the Court of Appeals would *sua sponte* conduct a *de novo* review of the "facts" submitted by Ahlstrom to determine the merits of the summary judgment in favor of AKO.

On January 9, 1995, the Court of Appeals affirmed the district court order granting summary judgment for AKO. (App., *infra*, 1a). On January 23, 1995, Columbia and Stevens filed a petition for rehearing with suggestion for rehearing en banc, and on April 12, 1995 the Court of Appeals denied that petition. (App., *infra*, 9a)

Because the summary judgment at issue in this case was entered on behalf of a non-appearing defendant by the United States District Court for the Northern District of California *sua sponte*, and was affirmed by the United States Court of Appeals for the Ninth Circuit, those entities are necessarily the respondents before this Court.

REASONS FOR GRANTING THE WRIT

The Federal Rules of Civil Procedure, in authorizing summary judgment, state in pertinent part: "A party...may... move...for a summary judgment...in the party's favor." (F.R.Civ.P. Rule 56(b)) "The judgment sought shall be rendered .. if .. the moving party is entitled to a judgment as a matter of law." (Id. Rule 56(c)) [Emphasis added.] This rule provides no basis for a district court to enter summary judgment *sua sponte*.

The Supreme Court has held that the party against whom summary judgment is rendered must have a full and fair opportunity to dispute the facts material to the claims in question.[2] That position has not been changed, and until this case, all circuits have followed that rule. The *Fountain* court found it unnecessary to rule on the propriety of an order for summary judgment by a district court in favor of one party after the opposite party had moved for summary judgment in its favor.

With the decision by the Court of Appeals in this case, what was a minor difference between circuits in handling this issue, has become a major rift.

I. The Court of Appeals' decision conflicts with the interpretations of other circuits and further widens a split of authority.

Cases on district courts issuing summary judgment *sua sponte* are unevenly split over the courts' authority to enter such orders. The majority of cases and most circuits clearly support the position that summary judgment *sua sponte* is not authorized. Most circuits interpret Rule 56 strictly, and require a motion with notice.[3] A clear

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[2] See *Fountain v. Filson*, 336 U.S. 681, 683 (1949): "Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for [defendant] Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her." See also: *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); *Cone v. West Virginia Paper Co.*, 330 U.S. 212 (1947).

[3] *Capital Films Corp. v. Charles Fries Prods.*, 628 F.2d 387 (5th Cir. 1980). ["This circuit has held that oral motions for summary judgment are (continued...)

exposition on that position is found in *Choudhry v. Jenkins*[4]. In that Seventh Circuit case, a plaintiff filed a civil rights action regarding the termination of his employment. The district court awarded summary judgment to defendant, "with no warning, taking plaintiff completely by surprise." The court of appeals reversed, stating:

> " Rule 56 plainly does not authorize a court to enter an arbitrary summary judgment *sua sponte* against a party; indeed the express language of paragraphs (a) and (b) of the Rule discloses that a motion for summary judgment is to be made by a party. Professor Moore consequently has concluded that 'the court should rarely consider entering summary judgment *sua sponte* where no party has moved for summary judgment or the provisions of Rule 12 are not satisfied.' 6 Moore's Fed.Prac. ¶56.12 (2d ed. 1976) at 338-339. We agree." [*Choudhry, supra,* at 1088-1089.]

On the other hand, some circuits have permitted the district courts to issue summary judgment *sua sponte* in the interests of judicial economy where the filing of a motion for the summary judgment would have been a mere

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[3](...continued)
inconsistent with the procedural safeguards of Rule 56 and therefore are not authorized." *Id.* at 391, fn. 1.] See also *Georgia Southern & Fla. Ry. v. Atlantic Coast Line R.R. Co.*, 373 F.2d 493 (5th Cir. 1967), cert. denied 389 U.S. 851; *Sharlitt v. Gorinstein*, 535 F.2d 282 (5th Cir. 1976).
Twin City Fed. Sav. & Loan Ass'n v. Transamerica Ins. Co., 491 F.2d 1122 (8th Cir. 1974). ["Courts of the eighth circuit ... have taken a position of strict compliance with the provisions of [Rule 56]." *Id*, at 1126.]; *Williams v. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986) [Summary judgment improper on issue not raised in motion].

[4] *Choudhry v. Jenkins*, 559 F.2d 1085 (7th Cir. 1977)

formality.[5] An almost universal provision in these cases is that there must be notice to the adverse party that such an action is contemplated. Professor Moore still rejects this authority, which appears to be based upon the courts' inherent authority to serve justice as it sees it.[6]

Even where district court's *sua sponte* grant of summary judgment have been authorized by the court of appeals in that circuit, there still has been virtually uniform reversal of those judgments where the parties have not received prior notice and opportunity for hearing. That had been true in the Ninth circuit as well until the ruling in this case.

The United States Court of Appeals for the Ninth Circuit has upheld *sua sponte* summary judgments.[7] However, with its decision in this case, that Court of Appeals has charted a course further away from the rule in *Fountain*. Prior to this decision, most district courts strictly applied the requirements of Rule 56, requiring a motion by a party with notice and opportunity to respond. In a split of authority regarding these strict requirements, a small minority of district courts, including the Ninth Circuit, have asserted the authority to grant summary judgment for a

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[5] *Denzer v. Purofied Down Products Corp.*, 474 F.Supp 773 (SD NY 1979). [District court gave moving party 20 days to respond before granting summary judgment for non-moving party]. See also *Herzog & Straus v. GRT Corp.*, 553 F.2d 789 (2d Cir. 1977). *Gellman v. State of Maryland*, 538 F.2d 603 (4th Cir. 1976) [*Sua sponte* summary judgment without notice perilously close to violation of due process]. *Yashon v. Gregory*, 737 F.2d 547 (6th Cir. 1984) [District court's *sua sponte* summary judgment improper because of lack of notice and opportunity to respond]. *Bowdidge v. Lehman*, 252 F.2d 366 (6th Cir. 1958) and *Kistner v. Califano*, 579 F.2d 1004 (6th Cir. 1978) [Judgments reversed because of lack of notice to adverse party].

[6] See 6 Moore's Fed.Prac. ¶56.12 (2d ed. 1993) at 56-169.

[7] *Portsmouth Square v. Shareholders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982).

non-moving party. A condition for the exercise of that authority was usually that both sides had full opportunity to dispute the material facts involved, and that the motion required was a mere formality. In order to satisfy that condition, the courts would need to establish that there were indeed no material facts in dispute, and that summary judgment was proper as a matter of law.

Regardless of its diligence and fairness, a court in assessing the state of the facts involved rarely sees those facts through the same eyes as the party affected. It is for this reason that most courts have strictly required the motion of a party with notice and opportunity to respond where summary judgment is to be entered on behalf of a non-moving party. This gives the maximum protection to that party which is about to have a summary judgment thrust upon him. That is a small price to pay in judicial resources for the protection against surprise, and is the fundamental reason that most courts and commentators favor the strict approach.

With the decision by the Court of Appeals in this case, the district courts would be given even greater latitude to enter arbitrary summary judgments *sua sponte*. District courts would then have the authority to resolve a variety of issues early in the course of a case. But what if the district court's view of the facts is in error, either through excellent advocacy by one party or through lack of diligence by the other party? Should that erroneous view now become the basis for a summary judgment that had never been sought?

II. The Decisions of the District Court and the Court of Appeals Are Erroneous

The District Court granted summary judgment for AKO without any notice to Columbia and Stevens that such was being considered. (App., *infra*, 26a). In all the cases cited above, including those in the Ninth Circuit, the element of notice to the adverse party is paramount. There is no question that the district court failed to follow the

preferred procedure. The District Court's reason for not giving notice and an opportunity to respond was never presented. However, there is little doubt that the district court's perception of the entire case was colored by its view that the case was totally frivolous. Petitioners do not share that view. In the arbitration proceedings, Stevens argued for the inclusion of fraud causes of action and for admissibility of evidence relating to that fraud. The arbitration panel refused to admit the fraud evidence and never considered that matter fraud. Petitioners do not agree with the District Court that the matter of fraud was adjudicated in the prior proceedings. A decision to exclude evidence of fraud and a fraud cause of action is not an adjudication on the merits of a fraud cause of action. Petitioners rights to a fair hearing of their arguments should not be diminished because of the court's view. This error could have been corrected, but was not corrected by the Court of Appeals.

The Court of Appeals erroneously concluded that it was not necessary for the district court to give notice to Columbia and Stevens of its *sua sponte* grant of summary judgment. Basically, the Court of Appeals decided, as did the district court before it, that because of issue preclusion there were no valid claims which could be asserted against AKO by either Columbia or Stevens. The appellate panel stated:

> " Stevens presented against Ahlstrom in the arbitration all claims which it could have presented against Ahlstrom's engineering subcontractor, AKO. The arbitrators found that Stevens did not prove damages caused by the alleged error and delay. This basis for the arbitration award compelled the conclusion, inferred by the district court, that even if Ahlstrom's subcontractor AKO was responsible for whatever error and delay there was, Stevens had exhausted its opportunity to prove damages." (App., *infra*, 6a) [Emphasis added]

Each of the three sentences in this portion of the opinion reflect serious errors. First, Stevens could not and did not present tort claims against Ahlstrom for which its subcontractor, AKO, was solely responsible. The misrepresentation underlying the tort action was not discovered until the arbitration was well under way, and beyond amendment. The issues litigated in the arbitration are defined in the arbitration statements. The issues that Columbia and Stevens were presenting in its tort action against AKO in the district court are defined in the complaint. A detailed comparison is not appropriate here, but the issues litigated in the arbitration, and the issues presented in claims against AKO are not the same. If Ahlstrom had cross-complained against AKO on the basis of Stevens' State complaint, then things may have been different, but that did not happen.

Second, contract damages and tort damages are not the same and require different facts and different proofs. The appellate panel implies that the damages claimed in the arbitration were the only damages possible, and failing to prove them to the satisfaction of the arbitrators would therefore preclude any possible claims arising from that job against any other subcontractor to Ahlstrom.

Third, the court of appeals infers the conclusion, and attributes the same inference to the district court, that in the arbitration, Stevens had exhausted its opportunity to prove damages against AKO. Plaintiffs are entitled to more than a mere inference in this matter. Also, in matters of a summary judgment, inferences should work to the benefit and not to the detriment of the adverse party. The fact that there was privity of contract between Ahlstrom and AKO does not confer upon AKO a protective mantle against any wrong it may have committed in the course of the work done. It is a matter of fact which should be disputed by petitioners and AKO, and not inferred from documents submitted solely on behalf of Ahlstrom in its motion for summary judgment. Plaintiffs had no opportunity to demonstrate to the district court that there

were different claims which were not precluded, and that there were compelling reasons why the findings of the arbitrators should not inure to the benefit of AKO. Finally, there were claims asserted against AKO by Columbia, neither of whom were parties to the arbitration of contract claims between Stevens and Ahlstrom. It takes a great leap to infer that all of the facts and the claims of the latter are going to agree with all the facts and preclude all the claims of the former. This is clearly best left to the parties to dispute with affidavits or trial evidence. But the facts were never presented by Columbia and Stevens with regard to AKO because the issue of summary judgment for AKO was never noticed and never discussed until it became an accomplished fact by the district court.

The Court of Appeals makes the further comment:

> " Our *de novo* review reveals no genuine issue of fact or entitlement against AKO as a matter of law, and affords some protection against defects which might have resulted from surprise." (App., *infra*, 7a)

By condoning the District Court's surprise *sua sponte* entry of summary judgment, the Court of Appeals deprives Columbia and Stevens of the protection provided by the notice requirement in Rule 56. The Court of Appeals now finds that it must review the facts *de novo* to give "some protection" where none would have been needed if a noticed motion were required. This is a conservation of judicial resources?

Further, the facts which the Court of Appeals reviewed were provided only by Ahlstrom in promoting its motion, and by the Columbia and Stevens in opposing that motion. If the issue of summary judgment for AKO had also been before the court when the facts were being presented, there would have been facts to substantiate the claims against AKO. There are copies of letters from AKO and others showing that AKO seriously misled Stevens and Columbia at the inception of the contract between Stevens

and Ahlstrom regarding the state of readiness and the complexity of the engineering drawings. This misrepresentation is only one of the grounds for the complaints against AKO.

Now, completing the circle, the Court of Appeals reviews those facts limited to the Ahlstrom motion, and concludes that since there are no genuine issues of fact in the file regarding AKO, the district court's shotgun summary judgment, which precluded those facts, should now be upheld.

These errors by the Court of Appeals demonstrate the very reason why this dangerous precedent of allowing district courts to enter *sua sponte* summary judgments without notice to the adverse party must not be allowed to stand. In spite of its best efforts to be fair and consider all the facts, the Court of Appeals has not given the adverse parties in this case the same protection that they would have had if they were allowed time and opportunity to marshall facts on their own behalf. The cost of judicial resources of requiring such notice and opportunity is minimal. The cost and potential prejudice to the adverse party of not requiring such notice and opportunity is monumental.

III. The Questions Presented Are Important

The major incentive cited by the Court of Appeals in reaching its decision in this case was the conservation of judicial resources. (App., *infra*, 8a). Beside the fact that the decision was clearly erroneous as pointed out above, there are two very important reasons why this decision should not be allowed to stand.

First, it is trading a plaintiff's right to have his day in court and to have his complaint heard on its merits, against a perceived conservation of judicial resources. There are a variety of ways in which the courts may choose to make such a trade-off. However, this case, if allowed to stand, would suggest that the district courts should be

authorized to enter arbitrary *sua sponte* summary judgments based on inferences by the court from unrelated affidavits.

Second, the anticipated savings in judicial resources were not realized in this case because of this appeal and petition. Further, an implementation of this technique in applicable future cases could actually lead to a cost of additional resources rather than a saving. In this case, the two petitioners originally considered filing separate complaints against each of the defendants. That could have meant as many as four individual lawsuits, some of which might have been consolidated. Since all those complaints arose from the same general body of facts, it seemed appropriate then to consolidate them into a single case. If, however, this case becomes the law of the Ninth Circuit, litigants in similar circumstances will not voluntarily consolidate such actions, and will resist motions by other parties to effect consolidation. This will not conserve judicial resources.

This Court should grant certiorari in order to protect a litigant's right to a full and fair opportunity to present his case, and to avoid a policy that wastes resources in the name of saving them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard M. Peekema
4817 Wellington Park Dr.
San Jose, CA 95136
(408) 224-8948
Counsel of Record

Of Counsel
Aldo Branch
2105 S. Bascom, Suite 248
Campbell, CA 95008
(408) 377-8787

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COLUMBIA STEEL FABRICATORS, INC.; STEVENS EQUIPMENT COMPANY,
Plaintiffs-Appellants,

v.

AHLSTROM RECOVERY; AARO KOHONEN OY,
Defendants-Appellees.

No. 93-15659
D.C. No. CV-92-04177-FMS
OPINION

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Submitted December 16, 1994*
San Francisco, California

Filed January 9, 1995

Before: Procter Hug, Jr., William C. Canby, Jr. and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

*On motion of appellants, the panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a); 9th Cir. R. 34-4.

SUMMARY

Civil Litigation and Procedure/Summary Judgment/ Res Judicata

The court of appeals affirmed a district court judgment. The court held that the district court did not err in granting *sua sponte* summary judgment in favor of a nonappearing party.

Appellee Ahlstrom Recovery was the general contractor building a boiler. Ahlstrom hired appellant Stevens Equipment Co. for steel fabrication, and Stevens contracted with its affiliate appellant Columbia Steel Fabricators, Inc. for materials. Ahlstrom hired appellee Aaro Kohonen Oy (AKO) for engineering.

Stevens and Columbia made a number of claims against Ahlstrom. Stevens sued Ahlstrom in state court, and then arbitrated its claims on its own and Columbia's behalf. Stevens prevailed on only some of its claims. The arbitration award was reduced to judgment in state court.

Columbia and Stevens brought a diversity suit against Ahlstrom and AKO. AKO never appeared. Ahlstrom moved for summary judgment. The district judge decided, after full consideration of the submission on the contested motion, that Ahlstrom was entitled to judgment on alternative independent grounds, res judicata and statute of limitations. She also made an express finding that the lawsuit was "frivolous and vexatious." The judge also said that summary judgment in favor of AKO was appropriate as well. Columbia and Stevens did not object.

Columbia and Stevens appealed the district court's *sua sponte* grant of summary judgment, contending that the district court could not properly grant summary judgment in favor of a defendant who did not appear in the case or move for summary judgment.

[1] The Ninth Circuit has previously upheld dismissal with prejudice in favor of a party which had not yet appeared, on the basis of facts presented by other defendants which had appeared. [2] The Ninth Circuit has also upheld *sua sponte* summary judgment. [3] The reasoning of these earlier authorities applied fully to this case.

[4] AKO was not a party to the arbitration with Ahlstrom. However, Columbia and Stevens did not demonstrate why they would not be precluded by the arbitration award and judgment in favor of Ahlstrom, which was in privity of contract with AKO.

[5] This case was appropriate for *sua sponte* summary judgment for the nonappearing party, AKO. Columbia and Stevens had a full and fair opportunity to brief and present evidence on the issues raised by Ahlstrom. These were the same issues controlling the AKO determination. The court held oral argument before granting summary judgment for AKO. Columbia and Stevens brought up AKO's presence as a party, but did not suggest to the district court that their case against AKO would require any additional or different evidence or briefing from their case against Ahlstrom. They did not demonstrate why their case against AKO would not be controlled by the decision in their case against Ahlstrom. They did not object to summary disposition at the time and in the manner it was made. [6] Under these circumstances, *sua sponte* summary judgment avoided what would have otherwise been a considerable and needless burden on AKO and the judicial system in a frivolous case.

COUNSEL

Richard M. Peekema, San Jose, California, for the plaintiffs-appellants.

No appearance for Aaro Kohonen Oy defendant-appellee.

OPINION

KLEINFELD, Circuit Judge:

The district court granted summary judgment *sua sponte* against plaintiffs, even though the defendant had not yet appeared. Another defendant had won summary judgment on the same grounds, and the court found the case to be frivolous. We affirm.

Facts

Ahlstrom was the general contractor building a boiler for Louisiana Pacific Corporation. Ahlstrom hired Stevens Equipment for steel fabrication, and Stevens contracted with its affiliate Columbia Steel for materials. Ahlstrom hired Aaro Kohonen Oy (AKO), in Finland, for engineering.

Stevens and Columbia made a number of claims against Ahlstrom, including that the engineering was bad and late, costing them more money. Stevens sued Ahlstrom in California state court, and then arbitrated its claims on its own and Columbia's behalf. Stevens prevailed in arbitration, but not on the claims related to the case at bar. After the arbitration award was reduced to judgment in state court, Columbia and Stevens brought this diversity suit.

In this federal case, AKO, the engineering subcontractor in Finland, never appeared. It had been served, but Stevens and Columbia had not filed proof of service, or requested entry of default, so when the district court granted summary judgment, the judge inferred from the record that AKO had not been served. As we analyze the case, the judge's erroneous belief that AKO had not been served does not matter.

Ahlstrom moved for summary judgment. The district judge decided, after full consideration of the submissions on this contested motion, that Ahlstrom was entitled to judgment on

alternative independent grounds, res judicata and statute of limitations. She also made an express finding that the lawsuit was "frivolous and vexatious," because all the claims at issue had been before the arbitration panel and had been considered by the arbitrators, were considered again by the arbitrators on Stevens' and Columbia's motion for reconsideration, and were considered again by the state court before it entered judgment based on the arbitration award. Because of the finding of frivolousness and vexatiousness, the district court granted Rule 11 sanctions against Columbia, Stevens, and their attorneys. Columbia and Stevens have settled with Ahlstrom, so the judgment for Ahlstrom, and the Rule 11 sanctions, are not before us on appeal.

At oral argument in district court, when counsel for Columbia and Stevens pointed out that the district court judge's grant of summary judgment to Ahlstrom left open the claims against AKO, the judge said that both defenses applied equally to AKO, and that summary judgment in favor of AKO was appropriate as well. Columbia and Stevens did not object, suggest that any different legal or factual considerations might apply to their claim against AKO, or ask for additional time to make any submission.

Analysis

Columbia and Stevens argue that the district court could not properly grant summary judgment in favor of a defendant who did not appear in the case or move for summary judgment. This proposition may generally be correct, but not always, and not here.

[1] We have upheld dismissal with prejudice in favor of a party which had not yet appeared, on the basis of facts presented by other defendants which had appeared. *Silverton v. Department of Treasury*, 644 F.2d 1341, 1344-45 (9th Cir.), *cert. denied*, 454 U.S. 895 (1991).

[2] We have also upheld *sua sponte* summary judgment. *Portsmouth Square v. Shareholders Protective Comm.*, 770 F.2d 866, 869 (9th Cir. 1985); *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982). We have specifically upheld *sua sponte* consideration of the res judicata effect of a prior judgment. *McClain v. Apodaca*, 793 F.2d 1031, 1032-33 (9th Cir. 1986); *Hawkins v. Risley*, 984 F.2d 321, 324 (9th Cir. 1993).

[3] These cases do not necessarily control. They do not go so far as to uphold *sua sponte* summary judgment based on res judicata in favor of a party which has not appeared. Nevertheless, the factual distinctions which might be drawn make no difference here. The reasoning of these earlier authorities applies fully to the case at bar.

[4] Columbia and Stevens correctly note that AKO was not a party to its arbitration with Ahlstrom. But collateral estoppel does not require that the party benefitting have been a party to the earlier litigation. Stevens presented against Ahlstrom in the arbitration all claims which it could have presented against Ahlstrom's engineering subcontractor, AKO. The arbitrators found that Stevens did not prove damages caused by the alleged error and delay. This basis for the arbitration award compelled the conclusion, inferred by the district court, that even if Ahlstrom's subcontractor AKO was responsible for whatever error and delay there was, Stevens had exhausted its opportunity to prove damages. It is well established that collateral estoppel can operate in favor of a party which did not litigate the earlier case, in appropriate circumstances. *Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383-84 (9th Cir. 1978); Restatement (Second) of Judgments § 29 (1982). Columbia and Stevens have not demonstrated why they would not be precluded by the arbitration award and judgment in favor of Ahlstrom, which was in privity of contract with AKO.

We do not reach the issues raised by the statute of limitations ground for the district court's decision. That defense

may possibly raise some different considerations from res judicata. Res judicata doctrine preserves scarce judicial resources, as well as protecting litigants from multiple lawsuits, *see McClain* at 1032-33, so courts have an independent interest in raising it, even if a party does not.

Sua sponte summary judgment in favor of a nonappearing party should not be routine. We noted in *Portsmouth* that the circumstances for such dismissal on the merits are "limited." *Portsmouth*, 770 F.2d at 869; *see also McClain*, 793 F.2d at 1032-33. It is a dangerous case management technique, because of the increased risk of error in the absence of full adversarial development of the facts and law. But it is not a prohibited technique under the circumstances of this case.

[5] This case was appropriate for *sua sponte* summary judgment for the nonappearing party, AKO. Several circumstances justified the relief. Columbia and Stevens had a full and fair opportunity to brief and present evidence on the issues raised by Ahlstrom. *See State of Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1225 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990). These were the same issues controlling the AKO determination. The court held oral argument before granting summary judgment for AKO. Columbia and Stevens brought up AKO's presence as a party, and did not suggest to the district court that their case against AKO would require any additional or different evidence or briefing from their case against Ahlstrom. They still have not demonstrated why their case against AKO would not be controlled by the decision in their case against Ahlstrom. They did not ask the district judge for time to consider whether their case against AKO would be different, or to submit any additional papers. Nor did they object to summary disposition at the time and in the manner it was made. The district judge found that the case was frivolous. Our *de novo* review reveals no genuine issue of fact or entitlement against AKO as a matter of law, and affords some protection against defects which might have

resulted from surprise. *See Schwartz v. Pillsbury, Inc.*, 969 F.2d 840, 845 n.3 (9th Cir. 1992).

[6] Under these circumstances, *sua sponte* summary judgment avoided what would have otherwise been a considerable and needless burden on AKO and the judicial system in a frivolous case.

AFFIRMED.[1]

[1]Appellants' "Motion for summary reversal" is denied.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COLUMBIA STEEL FABRICATORS, INC.;
STEVENS EQUIPMENT COMPANY
Plaintiffs-Appellants,

vs.

AHLSTROM RECOVERY; AARO KOHONEN OY,
Defendants-Appellees.

No. 93-15659
D.C. No. CV-92-04177-FMS

ORDER

Before: HUG, CANBY, and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED Cathy A. Catterson, Clerk
April 12, 1995 U.S. Court of Appeals

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COLUMBIA STEEL FABRICATORS, INC.)
and STEVENS EQUIPMENT COMPANY)
Plaintiffs,)
)
vs.)
)
AHLSTROM RECOVERY, INC. and)
AARO KOHONEN OY)
Defendants.)
)

No. C92-4177 FMS(ARB)
ORDER GRANTING SUMMARY JUDGMENT
TO DEFENDANTS

INTRODUCTION

Plaintiffs, Columbia Steel Fabricators, Inc. ("Columbia") and Stevens Equipment Inc. ("Stevens") filed this lawsuit for fraud, negligent misrepresentation and negligence against Defendants's Ahlstrom Recovery, Inc. ("Ahlstrom") and Aaro Kohonen Oy. Ahlstrom filed this motion for summary judgment asserting defenses of res judicata and statute of limitations. Ahlstrom has also requested sanctions under Fed.R.Civ.P. Rule 11. For the following reasons summary judgment is GRANTED in favor of Ahlstrom. Ahlstrom's request for sanctions is also GRANTED.

BACKGROUND

The controversy arises from a contract for steel fabrication to be used in construction of a facility in

California. Ahlstrom, the general contractor, subcontracted between Columbia and Ahlstrom. In the contract negotiations, Stevens and Columbia were represented by Mr. George Peekema, the President and CEO of both companies. There is also a substantial common ownership interest in Stevens and Columbia.

Ahlstrom and Stevens entered into the contract on February 18, 1989. This dispute involves questions over the completeness and correctness of the bid documents, as well as the delay in receiving the final engineering drawing. The final engineering drawings, promised by February 28, 1989, were not received until ten to twelve weeks after the promised date. (Decl. Lemke ¶ 9). Penalties, cost overruns and other costs allegedly resulted from Stevens efforts to adhere to the fabrication and delivery schedules that were based on the bid documents rather than the completed engineering documents. Extensive changes in the documents were required to meet the California seismic requirements. Stevens, Columbia and the certified engineering firm were all based in California.

Stevens filed a lawsuit in the Superior Court of California, County of Humboldt on June 8, 1990 on the theories of breach of contract, foreclosure of mechanic's lien, payment of stop notice, payment on bond, non-disclosure of material facts, breach of impled warranties, negligence, negligent misrepresentation, and quantum meruit. On August 17, 1990, both parties stipulated to arbitration as required by their contract. All claims by Stevens were submitted to the arbitration pane. Ahlstrom filed claims against Stevens that were submitted to arbitration as well. The arbitration award was entered by the court on May 8, 1991 as a full settlement of all claims submitted. The arbitration panel found that the evidence did not establish how much delay Stevens was responsible for, if any, or that the increased costs faced by Stevens reasonably resulted from the changes in the contract. (Award of Arb. p.1). The panel also found that Stevens was not entitled to "extra payment

for lost revenue at Columbia Steel.[1]

In May, 1991, Stevens' motion for reconsideration of findings and awards on specific claims was denied. Stevens' opposed confirmation, based in part on the contention that the arbitrator made a material error by excluding evidence that Ahlstrom "intentionally misled Stevens regarding the status of the engineering design." (Memo of P&A to vacate award p.6). On august 13, 1991, after hearings, review of the evidence and matters of record, the Superior Court issued an order confirming the arbitration award, thereby entering final judgment. Stevens' request to vacate the award was expressly denied by the court. (Order ¶ 5).

The case at bar was filed on October 16, 1992, a full fourteen months after the final judgment was entered in the prior proceedings and three years eight month after the allegedly fraudulent misrepresentation. Defendant Ahlstrom argues that both Stevens and Columbia have re-filed claims that are identical to those that have been sully and finally litigated and reduced to final judgment; therefore, the claims are precluded by the doctrine of res judicata. Ahlstrom further asserts that Stevens and Columbia's claims are barred by the statute of limitations.

ANALYSIS

I. Summary Judgment Standard

In order to withstand a motion for summary judgment, the opposing party must set forth specific facts showing there is a genuine issue of material fact in dispute. Fed.R.Civ.P. 56(e). Those facts must amount to "sufficient evidence favoring the [opposing] party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Further, summary judgment shall be granted "against a party who fails to make a showing

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[1] A claim for $96,000 for work performed at the Moses Lake Shop.

sufficient to establish the existence of a element essential to that party's case, on which that party will bear the burden of proof at trial ... since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The nonmoving party "may not rest upon the mere allegations ... of the [nonmoving party's] pleadings, but the [nonmoving party's] response, by affidavits or otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56. In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." Id. at 323. The party opposing a summary judgment motion bears the burden of showing what facts may be discovered that will raise material issues of fact. Terrell v. R.D. Brewer, 935 F.2d 1015, 1018 (9th Cir. 1991).

II. Statute of Limitation

Under Cal. Code Civ. P. § 338(d), the statute of limitations for fraud or mistake is three years. A plaintiff bringing a fraud claim over three years after the commission of the fraud must 'affirmatively excuse his failure to discover the fraud within three years after it took place." Denholm v. Houghton Mifflin Co., 912 F.2d 357 (9th Cir. 1990). In order to "affirmatively excuse" a failure to discover a fraud within the three-year period, a plaintiff must demonstrate "that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of the facts sufficient to put him on inquiry." Hobart v. Hobart Estate Co., 26 Cal.2d 412, 437 (1945). This standard is strictly applied and has even been the basis for dismissal of poorly plead fraud claims. Here, the alleged fraud occurred on February 18, 1989. This lawsuit was filed on October 16, 1992, three years and eight months after the fraud occurred. Stevens and Columbia have not adequately addressed the three year statute of limitations. Stevens and Columbia were put on notice by the Defendants Motion for Summary Judgment that the statute of limitations was at issue;

however, they failed to present any specific facts to demonstrate that the statute should not have run or that they had any factual support for failing to discover the fraud. Moreover, Stevens' and Columbias' own statements make it clear that they were aware of the possibility of fraud or misrepresentation shortly after the contract was formed.[2]

Stevens and Columbia rely on a theory of "discovery for the first time."[3] This is not the law. A prudent man would have suspected the fraud, and the court may determine, as a matter of law, that there had been discovery. Helfer v. Hubert, 208 Cal.App.2d 22, 26-27 (1962). As discussed above, Stevens suspected by its own admissions, let alone that of a "prudent man", that the engineering drawings were not complete as represented. Furthermore, Stevens was aware of underlying facts sufficient to put Defendant's on inquiry notice. (Complaint ¶ 15-18). In sum, Stevens not only has failed to meet its burden of providing facts that would excuse its failure to discover, but has affirmatively presented facts that are sufficient to have placed Dedendant's on notice. On this basis alone, the fraud claims are time barred and summary judgment can be granted as a matter of law.

III. Res judicata

The doctrine of res judicata provides that once

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[2] "During the first few months of this job, I could not understand how an engineering firm could produce such a detailed list of steel pieces as Ahlstrom provided with the bid documents on this job, and to promise to have complete engineering drawings within ten days, and then take more than 10 weeks to deliver only a portion of the work. It wasn't until I read the letter in Ahlstrom's correspondence file in December 1990 that I realized both Ahlstrom and AKO were aware of significant design problems related primarily to meeting seismic requirements imposed by California code... (Declaration Lemke ¶ 15).

[3] "In those Ahlstrom documents I discovered for the first time that .... I also discovered for the first time the TOTAL extent of the modification being made in the engineering drawings ...." (Lemke Declaration ¶ 14).

parties have had an opportunity to fully and fairly litigate the issues and claims, judgment is final. The doctrine establishes a bar to those claims and issues that were asserted, as well as those which could have been asserted in the prior litigation. Claim preclusion "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior litigation. Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1529 (9th Cir. 1985). The underlying public policy of res judicata is to insure finality of decisions, conserve judicial resources and to provide the parties a degree of protection from multiple lawsuits on matters that have been settled. Here, the prior litigation was in the form of an arbitration award that was entered as final judgment in the Superior Court of California, Humboldt County. Such a judgment is held to be final on the merits and binding on the parties. United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)(citing Cal. Civ. Proc. Code § 1287.4.) Summary judgment is appropriate when the doctrine of res judicata refutes all triable issues of fact suggested by the pleadings and supporting documents. See e.g. Sartor v. Superior Court, 187 Cal.Rptr. 247 (1982). (Summary judgment granted on basis of arbitration award which constitutes a final judgment on the merits).

To determine if the claims give rise to the same cause of action that has been previously litigated, the courts look to whether the subsequent action arises from the same basic underlying facts or the same transaction or occurrence. Claim preclusion not only applies to parties of prior litigation but to those in privity as well. Los Angeles Branch NAACP v. Los Angeles Unified School District., 750 F.2d 731, 741 (9th Cir. 1984), cert. denied 474 U.S. 919 (1985). The rule is broad in its preclusive effect and includes nonparties whose interest were virtually represented by one of the parties to the prior litigation. Id.

Ahlstrom and Stevens were clearly parties to the prior litigation. Columbia's interests were represented by

Stevens throughout the entire contract negotiations, contract performance, and prior litigation by Mr. George Peekema, the President and CEO for both parties. Also, there is substantial common ownership in Stevens and Columbia.

Columbia's claims for damages in the amount of $96,000 were asserted by Stevens in the arbitration proceedings. The arbitration panel considered the matter and final judgment on that claim was entered. Columbia has not provided specific facts to raise a genuine issue regarding lack of privity or virtual representation with Stevens.

Stevens' contends that its current claims were not apparent until the discovery of information in letters that allegedly show Ahlstrom knew of the pending delays and engineering changes to come. These letters were presented to the arbitration panel but excluded by objections from Ahlstrom because they related to earlier and different projects. The fact that the arbitration panel sustained Ahlstrom's objections to this evidence does not alter the preclusive scope of the arbitration. All claims arising from the contract were before the arbitration panel, and no claims were withheld from these proceedings.

Stevens has no basis for its argument that it has not had a full and fair opportunity to raise its current claims in the prior litigation. Stevens brought its proposed evidence of alleged fraud or misrepresentation by Ahlstrom to the attention of the panel. The evidence was considered and excluded. Stevens raised this issue before the state court in its memorandum of points and authorities in support of its motion to vacate the arbitration award. Thus, these claims were considered at least three times in the prior proceeding: in the initial arbitration; then in the request for reconsideration by the arbitration panel; and finally by the state court prior to entry of final judgment. Stevens is therefore precluded from relitigating all claims based on the same basic underlying facts, and the same transaction and occurrence, regardless of the legal theory it now uses to present the claims.

IV. Issue Preclusion

The doctrine of issue preclusion is to prevent the relitigation of all issues of fact or law that were actually litigated and necessarily decided in a prior proceeding. The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment. U.S. v Lasky 600 F.2d 765, 769 (9th Cir. 1979). Here, both parties have introduced a sufficient record of the prior proceeding to enable this court to determine the issues previously litigated. The record includes the state court complaint, the arbitration panel's findings and award, post hearing briefs, motions for reconsideration, memorandum of points and authorities requesting the state court to vacate arbitration award, lists of evidence and correspondence. Again, Stevens offers no evidence or intent that has not been previously litigated.[4] Furthermore, both parties had full opportunity to provide this court with necessary evidence.

In sum, the factual findings of the arbitration panel prevent Stevens and Columbia from establishing the elements of a fraud claim. Damages, causation, negligence and misrepresentation have been previously adjudicated by binding arbitration and judgment entered. In applying the summary judgment standard, the court shall be grant summary judgment "against a party who fails to make a showing sufficient to establish the existence of a element essential to that party's case, on which that party will bear the burden of proof at trial ... since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Stevens and Columbia have not provided the court with any specific facts to show a genuine issue for trial exists that has not been previously litigated.

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[4] Stevens argues "intentional misrepresentation" before the state court in its motion to vacate the arbitration award.

V. Sanctions

Ahlstrom seeks sanctions against Stevens and Columbia for fees and costs. The Court finds this lawsuit to frivolous and vexatious in nature. Stevens and Columbia were both represented by Mr. Peekema in the prior proceeding in state court as well as through the arbitration proceedings. Counsel has no excuse not to be fully aware of the facts and issues of the prior litigation and their finality, as well as the statute of limitations and the burdens it faced in overcoming summary judgment. Counsel's papers also demonstrated little understanding of the law as it related to these matter. For these reasons, under Rule 11 of Federal Rule of Civil Procedure, Stevens, Columbia and their attorney's, Mr. Branch and Mr. Peekema, are subject to sanctions in the amount of attorneys' fees and costs associated with this lawsuit.

CONCLUSION

For the above reasons, the court GRANTS Ahlstrom's motion for summary judgment.[5] Ahlstrom's request for sanctions is also GRANTED.

Defendants are to submit proposed costs and fees to both the court and the Plaintiffs within 10 days of this order.

Plaintiffs and their counsel have 10 days thereafter in which to respond as to why the proposed costs and fees are not justified.

SO ORDERED.

DATED: March 2, 1993 /s/ Fern M. Smith
United States District Judge

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[5] Aaro Kohonen Oy ("AKO") was also named in this lawsuit but has not yet been served. Res Judicata also applies to all claims against AKO. Summary judgment, therefore is GRANTED for AKO as well.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COLUMBIA STEEL FABRICATORS, INC. and STEVENS EQUIPMENT COMPANY
Plaintiffs,

vs.

AHLSTROM RECOVERY, INC. and AARO KOHONEN OY
Defendants.

Case No. C92-4177 FMS (ARB)

ORDER VACATING SANCTIONS ORDER AND JUDGMENT

Counsel for Plaintiffs and counsel for Defendant Ahlstrom Recovery, Inc. ("Ahlstrom") having informed the Court that Plaintiffs and Ahlstrom have reached a settlement, and having consented hereto, it is hereby ORDERED AND ADJUDGED, pursuant to Fed.R.Civ.P. 60(b), that this Court's Order of April 7, 1993 imposing $40,000 in Rule 11 sanctions on Plaintiffs and their counsel, and the Court's subsequent judgment of January 18, 1994 entered on the sanctions Order, are hereby VACATED. This Order affects the sanctions order and judgment thereon only, and does not vacate or affect the Court's March 2, 1993 Order granting Ahlstrom and Aaro Kohonen Oy summary judgment, or the Court's judgment of March 3, 1993 entered as a result of the summary judgment on the merits of Plaintiffs' claims.

This 14th day of March, 1994.

/s/
Fern M. Smith, Judge
United States District Judge
Northern District of California

CONSENTED TO BY:

/s/
John R. Heisse, II
(State Bar No. 13464)
PETTIT & MARTIN
101 California Street
35th Floor
San Francisco, CA 94111
(415) 435-4000

Attorney for Defendant
Ahlstrom Recovery, Inc.

/s/
Richard M. Peekema
(State Bar No. 118676)
4817 Wellington Park Dr.
San Jose, CA 95136
(408) 224-8948

Attorney for Plaintiffs
Columbia Steel Fabricators
Inc. and Stevens Equipment
Company

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COLUMBIA STEEL FABRICATORS, INC. and STEVENS EQUIPMENT
Plaintiffs,

vs.

AHLSTROM RECOVERY, INC. and AARO KOHONEN OY
Defendants.

Case No. C-92-4177

San Francisco, California
February 26, 1993
10:06 a.m.

TRANSCRIPT OF PROCEEDINGS
HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE THE HONORABLE FERN M. SMITH

APPEARANCES:
For the Plaintiffs: ALDO BRANCH, ESQ.
1671 The Alameda, Suite 217
San Jose, California 95126

-and-

RICHARD M. PEEKEMA, ESQ.
4817 Wellington Park Dr.
San Jose, California 95136

APPEARANCES (CONTINUED):

For the Defendants: PETTIT & MARTIN
BY: JOHN R. HEISSE II, ESQ.
101 California Street
San Francisco, California 94111

-and-

LONG, ALDRIDGE & NORMAN
BY: JOHN L. WATKINS, ESQ.
One Peachtree Center, Suite 5300
303 Peachtree Street
Atlanta, Georgia 30308

Court Recorder: LEONARD ROGERS
U.S. District Court
450 Golden Gate Avenue, 16th Floor
San Francisco, California 94102

Transcription
Service: Jo McCall
Electronic Reporting/Transcribing
3946 Pyle Avenue
Santa Rosa, California 95407

PROCEEDINGS

February 26, 1993 10:06 a.m.

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THE CLERK: All rise, please. The United States District Court for the Northern District of California is now in session, The Honorable Fern M. Smith presiding. Please be seated.

Civil Motion, Columbia Steel versus Ahlstrom Recovery.

State your names please, and whom you represent. Please make sure you speak into the microphones at all times.

MR. HEISSE: John Heisse for Columbia Steel -- I mean Ahlstrom Recovery, I'm sorry.

THE COURT: You're sure this time?

MR. HEISSE: I'm positive, Your Honor.

THE COURT: Okay.

MR. BRANCH: Good morning. Your Honor, Aldo Branch for Columbia Steel and Stevens Equipment.

THE COURT: Mr. Branch.

MR. WATKINS: Your Honor, I'm John Watkins for Ahlstrom Recovery.

THE COURT: Okay.

MR. PEEKEMA: Your Honor, Richard Peekema for Columbia Steel and Stevens Equipment.

THE COURT: All right. Let me ask the attorneys or whoever is speaking for Columbia Steel and Stevens Equipment first whether or not you have anything that you want to add to the papers. I really would prefer that you not summarize them. They've been read. Is there anything that you'd like to add that's not in the papers? Mr. Branch?

MR. BRANCH: What I'd like to add is that we have to look at the fundamental nature of the motion they're making, and that is that they're contending that they Plaintiffs have already had their day in court.

THE COURT: Sounds like a pretty solid contention to me.

MR. BRANCH: And where we would dispute that, Your Honor, is that while the case is based on the same project, it

still is a separate primary right on the fraud cause of action.

THE COURT: Mr. Branch, you know, people don't get four bites out of the apple. Now your clients submitted to binding arbitration. They've already brought up this matter for reconsideration. They've objected to everything. The courts under the arbitration rules have looked at it three different times, and they've lost. People can't submit to a binding arbitration, take advantage of the system, and then start all over again because they don't like the results.

I really -- you know, I was hoping that maybe there was a case somewhere that had been overlooked, but there isn't, and I have to tell you that this is one of the most frivolous, meritless suits that has come before me in a long time. And unless you have some rationale or some excuse for having brought this, not only is this suit going to end, but you and your clients are going to have to pay the other side for bringing this. There's just no merit to it.

MR. BRANCH: Well, as to the -- as to Columbia Steel, are you saying as well? I mean, Columbia --

THE COURT: As well. They're all the same party. You can't just -- I mean, your clients can't pick what name they want to go under, depending upon the court. This is the same entity, Mr. Branch.

MR. BRANCH: Well, I would dispute that, Your Honor.

THE COURT: Well, then you have a remedy with the Ninth Circuit, and maybe you'll fare better with the Ninth Circuit than you have with the California courts or that you have with me, but if really all you want to do is re-argue the points you've already made in your papers, Mr. Branch, then I'm afraid you're not going to find a very receptive audience here.

MR. BRANCH: I have essentially nothing further then.

THE COURT: Okay. Mr. Heisse, anything you'd like to say on behalf of Ahlstrom?

MR. HEISSE: No, Your Honor, other than to move the pro hoc into admission of Mr. Watkins -- a very short-lived admission, but nonetheless.

THE COURT: All right. That's granted. All right. I

intend to issue a written order so that if, in fact, the Plaintiffs wish to appeal this, they have a record of what has been done here, but it is my opinion that both on statute of limitations grounds and res judicata, that this lawsuit is without merit.

On the statute of limitations, the alleged fraud occurred on February 18th, 1989, and this lawsuit was filed on October 16, 1992, three years, and eight months after the fraud. Mr. Stevens suspected, by his own admissions, let alone that of any reasonable man standards, that the engineering drawings were not complete as represented, and furthermore, was aware of underlying facts sufficient to put the Plaintiffs on inquiry notice.

As to the res judicata, Columbia's claims for damages in the amount of $96,000 were asserted by Stevens in the arbitration proceedings. Stevens contends that its current claims were not apparent, until the discovery of information and letters that allegedly show Ahlstrom knew of the pending delays and engineering changes to come.

These letters were presented to the arbitration panel, but excluded because they related, in the opinion of the earlier -- in the opinion of the panel, to earlier projects.

Now, you know, the Plaintiffs may not like the ruling of the arbitration panel, but that doesn't give them the opportunity to make a new lawsuit out of it. All claims arising from the contract were before the panel and no claims were withheld from these proceedings. Those claims were considered at least three times in the prior proceeding: in the initial arbitration, in the request for reconsideration, and finally by a state court prior to entry of final judgment.

Stevens is precluded from relitigating those claims based on the same underlying facts and the same transaction, regardless of the legal theory it now uses to try to present the claims -- basically dressed up in new clothes.

The findings of the arbitration panel prevent both Stevens and Columbia from establishing the elements of a fraud claim. Damages, causation, negligence, misrepresentation, have all been previously adjudicated and judgment has been entered. Neither Stevens nor Columbia has provided the court with any

specific acts to show that any genuine issue of fact exists for trial that has not been previously litigated.

I find this lawsuit to be frivolous and vexatious in nature. I also find that counsel's papers demonstrate little understanding of the law as it relates to these matters. For these reasons, under Rule 11 of Federal Rules of Civil Procedure, Stevens and Columbia personally and their attorneys, Mr. Branch and Mr. Peekema are subject to sanctions in the amount of attorney's fees and costs associated with this lawsuit.

I would like the Defendants to submit their proposed costs and fees to the court with a copy to Plaintiffs within ten days. The plaintiffs and their counsel will have ten days from that time to respond on paper why those costs and fees are not justified.

There will be no further hearing on this matter. The court will, as I said, issue a written order so that if the Plaintiffs wish to pursue this matter further, they have a full record. This case is dismissed other than on the issue of the costs and fees. Mr. Branch?

MR. BRANCH: May I make a request for a presentation.

THE COURT: Sure.

MR. BRANCH: There is an additional Defendant.

THE COURT: Oh, yes. Thank you. He is out as well, Aaro Kohonen Oy, AKO, was also named in this lawsuit. The statute of limitations as well as res judicata bars all claims against that defendant, and summary judgment is entered as to the defendant as well.

Okay. Thank you all.

MR. BRANCH: Thank you, Your Honor.

(Whereupon, the proceedings were concluded.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

DATED: May 14, 1993 By: /s/
Jo McCall